

# Without the Benefit of Hindsight

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It is September the 24th, 2069. England celebrates the fiftieth anniversary of the historical events of those fateful autumn days back in 2019. Thousands flock to the newly opened Brexit Museum on the banks of the Thames for a moment of pensive commemoration: Yes, that's how it happened, they say. The older ones still remember, don't they? That's how it all started, that's how it turned out, that's how one thing came to the other, and that's how it all ended. That's how we became, for better or worse, who we are today.

What kind of story will this museum tell? How can you say without knowing how things will end? Without knowing who ultimately won? Will Boris Johnson be cast as hero and Lady Hale as villain or vice versa? Will the [Miller 2/Cherry decision of the UK Supreme Court of 24 September 2019](#) be displayed as an act of constitutional salvation or as a [constitutional coup](#)? How can you tell without knowing how the whole thing ended?

## Gdansk and Hong Kong

Last week I was in the northern Polish city of Gdansk, where the International Association of Law Schools met for their annual conference. I went there to talk to Law School Deans and to discuss the possibility of placing advertisements in the Verfassungsblog editorial and organising online symposia with us. One of the top sites to visit in Gdansk is the European Solidarity Center on the premises of the former Lenin shipyard – one of the most impressive exhibitions I have ever seen. It reconstructs what happened in those fateful days in the summer of 1980 when the Communist rule in Eastern Europe first started to crack.

You see the crane operator cabin where Anna Walentynowicz used to work until she was sacked from her job three months short of her retirement, which was the reason for the workers of the huge shipyard to go on strike in protest against the despotism of the Communist Party. You see the transport trolley of the electrician Lech Wałęsa. You see the original plywood panels with the 21 demands of the strikers. You see the objects and documents and photos and film clips, all of which form a coherent narrative that goes from that battered old cabin straight to the collapse of the Soviet Empire, one great, uplifting narrative leading, with the retarding moment of General Jaruzelski's martial law, directly to the glorious white-and-red finale.

++++++A Note from the Good Lobby++++++

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At the conference, I had the privilege of meeting David Law, Professor of Comparative Constitutional Law at the University of Hong Kong. He explained to me what is happening in his city right now: 1.7 million of the 7 million Hong Kong residents are participating in the protests against the despotism of the Beijing government. No one has any idea how this will end. Most of the protesters' demands could be met by the government at very little cost, but even that doesn't happen so far. Nor does the government send in the army, as the corrupt party elite depends on Hong Kong as a financial hub to launder their money and therefore would be hurt badly themselves in the case of a violent crackdown. Instead, the government seems to rely on a tactic of attrition, which doesn't work so well either, though: the numbers of protesters have been going up, not down. They refuse to be divided, they are liquid and leaderless, they do not give way. How long can this go on? How is all this going to end? No one can say. The people of Hong Kong protest for their right to protest and they continue to do so as long as they can. Isn't that answer enough?

Lech Wa##sa and all the other angry workers in the Lenin shipyard probably hadn't given much thought either in 1980 as to how their fight would eventually end. There was the outrage about their friend and colleague Anna Walentynowicz's layoff and the matter of food prices and the arrogance of the party nomenclatura in general, and they wouldn't let that stand. Ten years earlier, mass protests in the streets in Gdansk and Gdynia had been brutally crushed by the security forces, with dozens killed and many more in prison. They had learnt that lesson: no demonstrations out in the open, stay inside the shipyard instead where the security forces can't get you. How would it end? Where did it lead? No one knew. They were protesting for their right to protest, and they would continue protesting as long as they could, bringing

forth ever more unbelievable results as they went along. It was only afterwards that it all became history.

## A load of humbug

Should Boris Johnson emerge victorious from the current conflict, it's fairly predictable how the Brexit story will be told: the incredible adventures of wild Boris, who surmounted obstacle after obstacle and suffered hardship after hardship on his way to his perhaps tragic, perhaps glorious, but definitely heroic destiny. The role the UK Supreme Court and Lady Hale's spider brooch will be supposed to play in this story seems pretty predictable, as well.

I'd be curious to see how the museum historians come to terms with the reasoning of the judgement, however.

What the Supreme Court judges have done is to demand justification. If the Government prevents Parliament from exercising its constitutional functions in such exceptional times for such an exceptionally long time, they'd better have valid reasons. They didn't. No justification at all. What the government put forth instead – recess for party conferences, preparation of Queen's Speech and so forth – was all just see-through subterfuge, a sorry excuse for a justification not even expected to be believed by anyone. [Never heard such humbug in my life](#), as the PM likes to put it in much less suitable contexts. This was established by the Supreme Court which went on to conclude that a prorogation as ill-justified as that was illegal and null and void.

Now, it's true that the step towards constitutional jurisdiction which this decision implies can be rightly criticized as crowbarring the already badly disjointed Westminster model of government even further apart, and it's also true that us *verfassungsgerichts*-happy Germans tend to turn a blind eye to the potentially averse effects of that. Nevertheless, the fact remains: the government, when asked by the court, couldn't come up with a valid justification for what it did. This is what happened. Regardless of the end.

This is what sets this narrative apart from the "adventures of wild Boris" story. Whoever turns out to be the winner, the future museum historians will have to acknowledge this fact. If they don't, it will all just be propaganda and a load of humbug.

## Game of Chicken

In terms of constitutional law, the verdict of the **UK** Supreme Court is undoubtedly of uttermost importance – but as far as Brexit is concerned, its effect is remarkably slight, as [MICHAEL WILKINSON](#) notes. [EMANUEL TOWFIGH](#) opposes the idea that Johnson's actions are irrational and explains the economic logic behind the Prime Minister's "game of chicken". [ARIS GEORGOPOULOS](#) would also have decided for the justiciability of the prorogation matter, but against its illegality. With regard to

Brexit, [OLIVER GARNER](#) explains why the demands of the British government with respect to the Northern Ireland backstop could only be met by the EU-27 in disregard of its own law.

In **Poland**, too, the government has discovered the charms of rigging the parliamentary system: The current session has been interrupted and postponed to a date after the parliamentary elections on 13 October – a date when the new parliament has already been elected but not yet convened. [PIOTR ZIÓ#KOWSKI](#) describes the sinister purposes for which the PiS majority could exploit this step, including sudden constitutional changes.

+++++++A Note from HU Berlin+++++++



**Die Juristische Fakultät der Humboldt-Universität Berlin sucht  
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In **Italy**, Matteo Renzi has split from the *Partito Democratico*, further destabilising the already shaky new PD-M5S government. [CARLO FUSARO](#) shows how the Italian party system is returning to the old, unstable conditions of before 1993.

In **Israel**, the incumbent PM Benjamin Netanyahu has announced his intention to annex large parts of the occupied Palestinian territories in the event of his re-election. [TAMAR HOSTOVSKY BRANDES](#) explains what a difference it would make to carry out *de iure* what *de facto* has already taken place for years.

In **Hungary**, the Supreme Court has declared it illegal for judges to refer cases to the European Court of Justice because they no longer consider themselves sufficiently independent. [PETRA BÁRD](#) shows that it was sheer desperation that forced the judges to take such steps.

The recent judgement of the European Court of Justice on **Google** and the "right to be forgotten" should rightly be forgotten, says [OSKAR GSTREIN](#).

**Facebook** has substantiated its plans to install a "Supreme Court" to resolve disputes about hate/free speech, and [QUIRIN WEINZIERL](#) examines what these plans imply.

The **German** Federal Administrative Court's decision to refer the matter of data retention to the European Court of Justice helps in [MAX SCHULZE's](#) opinion above all the Federal Constitutional Court.

The **Italian** Constitutional Court has decided to loosen the criminalisation of assisted suicide itself, after the parliament failed to do so in spite of being told to by the Court before. [PIETRO FARAGUNA](#) examines the procedural backgrounds and implications of this decision and criticizes the fact that courts increasingly act as shepherds of parliament instead of guardians of the constitution.

In **Russia**, Vladimir Putin's government has recently experienced a wave of regional protests on the occasion of what [GLEB BOGUSH](#) believes should not be called elections.

In **India**, the nativist government is pushing hundreds of thousands of mostly Muslim citizens into statelessness in Assam. [CATHARINA CASPARI](#) draws our attention to this far too little noticed human and citizen rights disaster of vast proportions.

In **Germany**, a court has ordered a marriage with an underage EU citizen to be officially recognized, even if mustn't be under the strict new German legislation. [JULIA MOSES](#) explores the culturalist distortions with which the subject of "child marriage" is often looked at in Germany.

## Elsewhere

[ANDRÁS KÁDÁR](#) describes how the ECtHR has raised the hurdles for complaints from **Hungary**.

[CAROLINE MARIE LANCASTER](#) shows that being radical right-wing and in favour of women's and LGBT rights is no longer incompatible in **Europe**.

[VINCENT MARTENET](#) examines the ruling of the **Swiss** Federal Supreme Court, which overturned a referendum for the first time.

[LYNN KHATIB](#) describes from her own experience what it means to be a **stateless** person.

[ANNA WÓJCIK](#) finds things to like about the disappointing opinion of Advocate General Tanchev in the matter of independence of the **Polish** judiciary.

If you want to read more about the groundbreaking **UK** Supreme Court's *Miller 2/Cherry* ruling, the [UK Constitutional Law Blog](#), to name but one, offers an abundance of brilliant posts this week.

So much for this incredibly eventful week. As if all that weren't enough already, the **USA** has also seen some really remarkable and possibly impeachable revelations in terms of Presidential misconduct on which we hope to post a few enlightening blog posts very soon, too.

Tomorrow I will leave for the UK to travel around for a few days and visit law professors and see for myself how the Brits are holding up in these times of constitutional upheaval. This will certainly be very exciting. I will report on what I have found out, so stay tuned!

And please don't forget to support us on [Steady](#).

All the best,

Max Steinbeis

